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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAPOSTED ON WEBSITE
NOT FOR PUBLICATIONUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 07-30385-D-13L
)
 KEVIN M. FLOYD and) Docket Control No. SdB-3
 SHERRIE A. FLOYD,)
)
 Debtors.) Date: November 10, 2008
) Time: 1:00 p.m.
) Dept: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On September 23, 2008, the debtors herein, Kevin M. Floyd and Sherrie A. Floyd ("the debtors"), filed Debtors' Motion for Order Valuing Collateral, bearing Docket Control No. SdB-3 ("the Motion"), by which the debtors seek to value the secured claim of Specialized Loan Servicing ("Specialized") under its second position deed of trust against the debtors' residence, at 350 Valley Oak, Vallejo, California ("the property"), at \$0. The matter came on for hearing on November 10, 2008, and the parties were to submit supplemental briefs by December 2, 2008, after which time the record closed. If the Motion were granted, Specialized's claim would be treated in this chapter 13 case as a general unsecured claim.¹ In bankruptcy parlance, the debtors

1. Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and

(continued...)

1 seek to strip Specialized's deed of trust off the property.

2 Specialized opposes the Motion, arguing that the amount of
3 the first position deed of trust against the property, held by
4 Option One Mortgage Corporation, is less than the value of the
5 property. If Specialized is correct, its lien cannot be stripped
6 off. Nobelman v. American Sav. Bank, 508 U.S. 324, 327-32
7 (1993). For the reasons set forth below, the court will deny the
8 Motion.

9 I. INTRODUCTION

10 In their schedules of assets and liabilities filed in this
11 case, the debtors listed the value of the property as \$551,000,
12 and listed the amounts owing to Option One at \$501,695.92 plus
13 arrearages of \$29,986.14, and to Specialized at \$110,990.46 plus
14 arrearages of \$4,647.12.

15 The debtors filed their chapter 13 petition on December 3,
16 2007, along with their schedules and proposed chapter 13 plan.
17 The meeting of creditors was held and concluded on January 3,
18 2008, and the trustee's report of the meeting shows there were no
19 issues to be resolved. However, by March 5, 2008, no plan had
20 been confirmed, and on that date, the trustee filed a motion to
21 dismiss the case for failure to make payments under the proposed
22 plan. According to that motion, the debtors had failed to
23 commence plan payments, and were \$11,320 delinquent under the
24 terms of the proposed plan. The trustee's motion was set for
25 hearing on April 3, 2008.

26
27 1. (...continued)
28 Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
(2005) ("BAPCPA").

1 On April 2, 2008, the day before the scheduled hearing, the
2 debtors filed an application to convert the case to a case under
3 chapter 7 of the Bankruptcy Code; the application was granted on
4 April 3, 2008. On April 23, 2008, Option One filed a motion for
5 relief from the automatic stay, which was denied by minute order
6 dated May 22, 2008, because of Option One's failure to properly
7 serve the debtors, their counsel, and the chapter 7 trustee. The
8 chapter 7 meeting of creditors was held and concluded on May 12,
9 2008, and the chapter 7 trustee caused a report of no
10 distribution to be issued.

11 On June 17, 2008, Option One again filed a motion for relief
12 from stay, and set it for hearing on July 16, 2008. Although the
13 notice of hearing called for written opposition pursuant to Local
14 Bankruptcy Rule 9014-1(f)(1), the debtors filed no opposition.
15 Instead, on July 15, 2008, the day before the scheduled hearing,
16 the debtors filed an application to reconvert the case to chapter
17 13. The application was granted on July 17, 2008 and relief from
18 stay was granted in favor of Option One on July 18, 2008.

19 The debtors filed an amended chapter 13 plan on July 31,
20 2008, but did not file a motion to confirm it. There was no
21 motion to value collateral attached to the amended plan, and the
22 debtors filed no stand-alone motion to value Specialized's
23 collateral.

24 On September 8, 2008, Specialized filed an objection to
25 confirmation of the amended plan, on the ground that the plan
26 failed to provide for its secured claim. The debtors responded
27 on September 16, 2008, indicating their belief that Specialized's
28 collateral had no value, and stating that they intended to file a

1 motion to value Specialized's secured claim at \$0.

2 The debtors finally sought to value Specialized's secured
3 claim on September 23, 2008, when they filed the Motion. In
4 support of the Motion, debtor Kevin Floyd testified in a
5 declaration that "[t]he property is encumbered by a first deed of
6 trust which is held by Option One Mortgage Corp. The first deed
7 of trust secures a loan with a balance of \$567,844.87." This
8 figure is the total of principal, interest, and costs claimed by
9 Option One in its motion for relief from stay filed June 17,
10 2008. According to Option One, the figure includes interest,
11 late charges, and costs incurred through May 30, 2008.²

12 In its opposition to the Motion, Specialized did not dispute
13 the valuation of the property at \$551,000, but pointed out that
14 the amount owing to Option One as of the petition date (December
15 3, 2007) was \$537,533.92. This is the amount claimed by Option
16 One in its proof of claim filed December 13, 2007. Specialized
17 takes the position that because this amount is less than the
18 value of the property, \$551,000, the debtors' attempt to strip
19 off Specialized's lien must fail under the Nobelman decision.

20 In a supplemental brief filed October 31, 2008, the debtors
21 argued that the interest that had accrued post-petition on Option
22 One's claim as a result of the debtors' failure to make ongoing
23 mortgage payments should be included in the amount due Option One
24 for purposes of valuing Specialized's second deed of trust.

25 / / /

26

27

28 2. Motion for Relief from Automatic Stay and Memorandum of
Points and Authorities in Support Thereof (11 U.S.C. § 362 and
Bankruptcy Rule 4001), filed June 17, 2008, DC No. PD-2, 3:18-22.

1 At the court's request, on December 2, 2008, both parties
2 filed supplemental briefs addressing the question as of what date
3 the value of Specialized's claim should be determined, for
4 purposes of the Motion.

5 II. ANALYSIS

6 Pursuant to § 506(a)(1), "a claim is secured only to the
7 extent of the value of the property on which the lien is fixed;
8 the remainder of that claim is considered unsecured." United
9 States v. Ron Pair Enterprises, 489 U.S. 235, 239 (1989). In a
10 chapter 13 case, if a claim is secured only by the debtor's
11 primary residence and the value of the property is sufficient to
12 secure the claim at least in part, § 506(a)(1) may not be used to
13 bifurcate the claim. § 1322(b)(2); Nobelman at 327-32. However,
14 if the value of the property is such that it provides no security
15 at all for the claim; that is, if the claim is totally unsecured,
16 § 506(a)(1) may be used to bifurcate the claim and "strip off"
17 the lien. Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d
18 1220, 1226-27 (9th Cir. 2002); Lam v. Investors Thrift (In re
19 Lam), 221 B.R. 36, 41 (9th Cir. BAP 1997).

20 In this case, because the amount owed to senior lienholder
21 Option One has increased since the filing of the petition to an
22 amount greater than the value of the property, determination of
23 whether Specialized's claim is partially secured or totally
24 unsecured depends on the date as of which the claim is valued.³

25
26 3. Section 506(a)(1) speaks in terms of valuing the
27 creditor's interest in its collateral, rather than valuing the
28 collateral itself. The value of the collateral and the amount
owed to senior lienholders must both be determined in order to
value the creditor's interest; the only logical approach is to
(continued...)

1 On the petition date, the value of the property exceeded the
2 amount owed to Option One, leaving \$13,466.08 in value to secure
3 Specialized's claim. Thus, if the correct date for valuation is
4 the petition date, Specialized's claim will not be subject to
5 bifurcation, pursuant to Nobelman. However, as of June 17, 2008,
6 six months into the case, the amount owed to Option One exceeded
7 the value of the property, leaving no equity to even partially
8 secure Specialized's claim. Thus, if the correct valuation date
9 is a date on or after June 17, 2008, then pursuant to Zimmer and
10 Lam, Specialized's claim may be bifurcated into a secured claim
11 of \$0 and an unsecured claim in the full amount of the claim,
12 \$116,769.42, and treated in the plan as entirely unsecured.

13 Section 506(a)(2), added to the Code by BAPCPA, contains
14 specific provisions for choosing the appropriate valuation date
15 for claims secured by personal property individual chapter 7 and
16 chapter 13 cases. As BAPCPA does not address claims secured by
17 real property, pre-BAPCPA law and analysis remain applicable.
18 Section 506(a)(1) does not provide specific provisions regarding
19 the appropriate dates for valuing real property claims. Section
20 506(a)(1) does, however, provide this guidance:

21 Such value [the value of the creditor's interest in the
22 property] shall be determined in light of the purpose
23 of the valuation and of the proposed disposition or use
24 on such disposition or use or on a plan affecting such
creditor's interest.

25 § 506(a)(1).

26 / / /

27 _____
28 3.(...continued)
determine both figures as of the same date.

1 This is designed to give the court a degree of flexibility
2 for real property valuation. Based on this language and on §
3 1325(a)(5)(B)(ii), courts have held that the correct date for
4 valuing a creditor's interest in property under § 506(a)(1) in a
5 chapter 13 case is the effective date of the debtor's plan, a
6 date at or near the confirmation date, rather than the date of
7 filing of the debtor's petition. See In re Nice, 355 B.R. 554,
8 562 (Bankr. N.D. W.Va. 2006) [valuing personal property claim
9 prior to new § 506(a)(2)]; Crain v. PBS Lending Corp. (In re
10 Crain), 243 B.R. 75, 83 (Bankr. C.D. Cal. 1999); In re Jones, 219
11 B.R. 506, 509 (Bankr. N.D. Ill. 1998) [valuing personal property
12 claim prior to new § 506(a)(2)].

13 As a general principle, this court agrees, finding
14 persuasive the detailed reasoning of the Nice court. In this
15 case, as in Nice and Crain, the purpose of the proposed valuation
16 is to determine the treatment of a creditor's claim through the
17 debtors' chapter 13 plan. More specifically, the court must
18 determine whether the debtors' proposed treatment of
19 Specialized's claim complies with § 1325(a)(5)(B)(ii); that is,
20 whether the value, as of the effective date of the plan, of
21 property to be distributed to Specialized under the plan is not
22 less than the allowed amount of its claim. This comparison makes
23 the most sense if the two values -- the value of the property to
24 be distributed under the plan and the value of the creditor's
25 allowed secured claim -- are determined as of the same date. See
26 In re Owens, 120 B.R. 487, 492 (Bankr. E.D. Ark. 1990) [valuing a
27 vehicle prior to new § 506(a)(2)].

28 / / /

1 As suggested by Specialized, the court recognizes that
2 pursuant to § 502(b), the amount of a claim is determined as of
3 the petition date for purposes of allowance. However, allowance
4 of claims generally under § 502(b) and fixing the amounts of
5 secured claims under § 506(a) are two different concepts. The
6 former section does not purport to fix the petition date as the
7 valuation date for the purpose of determining the secured portion
8 of a creditor's allowed claim. Crain at 83.

9
10 While the amount of the claim is fixed at the petition
11 date, the statute does not fix the secured claim at
12 that time. That principle is clear from the second
sentence of § 506(a) that expressly contemplates that
the secured portion of a claim may fluctuate based on
the time and purpose for which valuation is sought.

13 Nice at 560, quoting In re King, 2003 WL 22110779, *2, 2003
14 Bankr. LEXIS 1133, *7-8 (Bankr. E.D. Pa. 2003).

15 This principle is underscored by § 506(a)(2), added by
16 BAPCPA, which specifies valuation dates for claims secured by
17 personal property, including, for personal property acquired for
18 personal, family, or household use, the price a retail merchant
19 would charge "at the time value is determined."

20 In short, the court views the two code sections, § 506(a)(1)
21 and §502(b), as serving distinct purposes. However, to the
22 extent, if any, there is a conflict or tension between the two,
23 the former, as the more specific on the subject, will control on
24 the issue of fixing the secured and unsecured portions of a
25 single claim. When two statutes address the same subject matter,
26 the more specific of the two trumps the more general. Neary v.
27 Padilla (In re Padilla), 222 F.3d 1184, 1192 (9th Cir. 2000).

28 / / /

1 Next, valuing secured claims as of the petition date "does
2 not construe § 506(a) in harmony with the adequate protection
3 provisions of the Bankruptcy Code." See King at *11.

4 Adequate protection prevents loss to secured creditors
5 during a case by requiring debtors to pay secured
6 creditors for depreciation of their collateral prior to
7 confirmation. If secured creditors' secured claims
were fixed at filing, there would be no need for these
payments--the creditor would automatically receive that
value in a plan or liquidation.

8 King at *11, quoting In re Kennedy, 177 B.R. 967, 972 (Bankr.
9 S.D. Ala. 1995). The petition date approach fails to take into
10 account the various remedies available to the creditor to protect
11 against a post-petition decline in the value of its secured
12 claim, such as motions for relief from stay or for adequate
13 protection. See Nice at 563.

14 Next, the court acknowledges Specialized's citation to
15 Kendall v. Lynch (In re Lynch), 363 B.R. 101 (9th Cir. BAP 2007),
16 and In re Kuhlman, 254 B.R. 755 (9th Cir. BAP 2000); however,
17 they are not applicable to the issues in this case because they
18 pertain to valuation for purposes of § 348(f)(1)(B), not
19 § 506(a)(1) or § 1325(a)(5)(B)(ii).

20 Finally, the court declines Specialized's suggestion that
21 "the Court's approach should adapt to the current market
22 conditions," and therefore, that the court should value
23 Specialized's secured claim as of the petition date because of
24 the declining real estate market. Of course, in a favorable real
25 estate market, property will appreciate post-petition, and
26 creditors would urge the courts to use the confirmation date to
27 value their claims.

28 / / /

1 In sum, as a general rule, the confirmation date is the
2 appropriate date for a § 506(a)(1) valuation of real property,
3 for purposes of a creditor's treatment in a chapter 13 plan,
4 pursuant to § 1325(a)(5)(B)(ii). However, there are times when
5 the equities of a particular case require a departure from this
6 rule. See King at *15, n. 14.

7 Section 506(a)(1) clearly suggests a flexible approach, and
8 the equities of this case dictate that the court should vary from
9 the general rule and use the petition date for valuation of
10 Specialized's claim. The only reason the value of Specialized's
11 secured claim has declined since the petition date is the fact
12 that the debtors failed to make their post-petition payments to
13 Option One, for a period of at least six months, adding at least
14 \$30,310 to the balance due Option One.

15 The debtors' chapter 13 plan, filed with their petition,
16 classified Specialized in Class 1, thus calling for the cure of
17 all pre-petition arrears, and for Specialized to retain its lien.
18 Nothing in the plan, and nothing else filed at the time or for
19 the next eight months, gave Specialized any reason to believe the
20 debtors would propose to strip off its lien.

21 Although the chapter 13 trustee concluded the debtors'
22 meeting of creditors with no issues to be resolved, the debtors
23 failed to submit an order confirming the plan. Three months
24 passed from the petition date to the date the trustee filed his
25 motion to dismiss the case for failure to make plan payments.
26 The debtors waited until the day before the hearing, and then
27 converted the case to chapter 7. They then waited three and one-
28 half months longer, until the day before the hearing on Option

1 One's relief from stay motion, before moving to reconvert to
2 chapter 13. All the while, the debtors were not making post-
3 petition payments to Option One.

4 In these circumstances, the equities clearly weigh against
5 the debtors, as the parties responsible for the delay and for the
6 decreased value of Specialized's secured claim. Utilizing a
7 flexible standard, as called for by § 506(a)(1), the court will
8 depart from the general rule and value Specialized's secured
9 claim in this case as of the petition date. To do otherwise
10 would be to encourage gamesmanship by debtors in the
11 administration of their bankruptcies.

12 III. CONCLUSION

13 The court finds the value of the property to be \$551,000
14 and the amount owed to Option One to be \$537,533.92, both as of
15 the petition date. As the value of the property is sufficient to
16 secure Specialized's claim at least in part, § 506(a)(1) may not
17 be used to bifurcate the claim. § 1322(b)(2); Nobelman at 327-
18 32. Accordingly, the Motion will be denied.

19 The court will issue an appropriate order.

20 Dated: December 24 2008

21 Robert S. Bardwil
22 ROBERT S. BARDWIL
23 United States Bankruptcy Judge
24
25
26
27
28

Certificate of Service

I certify that on December 24, 2008 a copy of the foregoing document was mailed to the following:

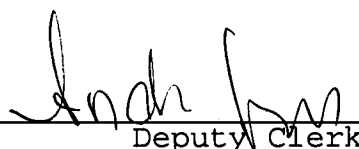
Lawrence Loheit
P.O. Box 1858
Sacramento, CA 95812-1858

W. Scott de Bie
1107 2nd Street, #220
Sacramento, CA 95814

Kevin Floyd and Sherrie Floyd
350 Valley Oak
Vallejo, CA 94591

William Malcolm
Malcolm Cisneros
2112 Business Center Dr., 2nd Floor
Irvine, CA 92612

FOR THE COURT
RICHARD G. HELTZEL
CLERK, U.S. BANKRUPTCY COURT

By: 
Deputy Clerk